

SUMMARY OF MMSD POSITION REGARDING MILORGANITE MATTER

October 17, 2017

BACKGROUND ON MILORGANITE® ISSUE

- **Longstanding History and Strong Reputation of MMSD/Milorganite®:** The Milwaukee Metropolitan Sewerage District (MMSD) has a long and proud history of water reclamation and resource recovery in the Greater Milwaukee area, particularly with its successful production of Milorganite® fertilizer since 1926 – one of the nation’s oldest recycling efforts.
- **JIWR Facility Permit:** Milorganite® is produced from MMSD’s Jones Island Water Reclamation (JIWR) Facility pursuant to a Wisconsin-issued National Pollutant Discharge Elimination System (NPDES) permit¹ and 40 C.F.R. Part 503, regulations governing disposal of sewage sludge from a publicly owned treatment works (POTW).
- **EPA R5 Inspection:** On March 14, in response to an external request by a Delaware state regulator R5 conducted a biosolids inspection of MMSD’s Jones Island Facility with an interest in determining Part 503 compliance. R5 produced a report of its findings April 25, 2017, concluding that:
 - MMSD failed to meet its particle temperature documentation requirements under Wis. Admin. Code NR 204.06(9)(a) (MMSD asserts that its extensive temperature monitoring is compliant with Wisconsin law);
 - MMSD failed to conduct fecal coliform sampling in accordance with its permit and Wis. Admin. Code NR 204.07(6)(a)(1) (MMSD asserts that its fecal coliform sampling is compliant with Wisconsin law); and
 - MMSD failed to meet fecal coliform laboratory testing and transportation requirements under its permit and pursuant to Part 503.8(b)(2).
- **EPA R5 Enforcement and AO:** R5 met with MMSD and its counsel on June 19, 2017 to discuss the findings of the inspection, a draft Administrative Order on Consent (AO), and MMSD’s belief that these issues are best addressed through more specific terms developed by the State in its ongoing permit renewal. Negotiations with R5 are ongoing as to the content of the draft AO and drafts have been exchanged between MMSD and R5. R5 may agree to meet on a second occasion to discuss additional edits and next steps, but has requested a written counterproposal from MMSD before it will commit to another meeting.

¹ JIWR Facility’s NPDES permit, No. WI-0036820-03-1, was issued under Section 402 of the Clean Water Act, 33 U.S.C. 1342, effective on January 8, 2013.

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MMSD CONCERNS ABOUT REGION 5 POSITIONS**POINT ONE: R5 ENFORCEMENT OF NEW, PREVIOUSLY UNANNOUNCED AND POTENTIALLY UNACHIEVABLE STANDARDS FOR 40 C.F.R. PART 503 COMPLIANCE.**

- *R5 Introduces a New and Previously Unannounced Interpretation of Monitoring and Reporting Temperature Measurement Requirements for Part 503 Compliance.*
 - R5 claims MMSD violated federal requirements for measuring, reporting, and documenting temperature of sewage sludge in completing pathogen removal based upon an expanded and previously unprecedented interpretation of Wisconsin law.
 - Wisconsin law requires only that MMSD “develop and retain” records of its compliance with class A pathogen requirements for a period of five years.
 - R5 interpreted that Code provision to preclude any demonstration of compliance with product temperature requirements that relies on “an evaluation of correlations or probability.”
 - R5 problematically uses the Wisconsin Administrative Code as a foundation for interpreting both Wisconsin and federal requirements under Part 503, concluding – apparently for the first time – that “the regulations do not provide for an evaluation of correlations or probability”² to demonstrate compliance with particle temperature requirements by indirect measurement of temperature.
 - R5’s interpretation is not found in federal law, Wisconsin law, or past agency guidance, and R5’s actions would embellish upon the stated regulatory requirements without the benefit of legislative process, or formal guidance or – at a minimum - industry-wide notice.
- *Though stated as mandatory in the initial draft AO, R5 and the Agency have previously allowed other municipalities and POTWs to use “evaluation of correlations or probability” as evidence of Part 503 temperature compliance.*
 - R5’s insistence upon direct temperature measurement of sludge particles is inconsistent with past practice and prior acceptance of indirect evidence of temperature compliance.
 - Indirect evidence is sufficient to show compliance, specifically as it concerns the Part 503 heat drying temperature requirement.
 - Finally, MMSD’s pilot program of testing from the dryer outlet at the JIWR Facility has shown that product temperatures are consistently in compliance at both the dryer outlet location and the previously used screw conveyor location.

² See October 3, 2017 Letter from J. Matthew Moore, Asst. Regional Counsel, Region 5, U.S. Environmental Protection Agency, to Richard Davis, Beveridge & Diamond, PC.

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- *There is little evidence that direct measurement of temperature as would be required under the R5 AO is technically feasible or used by any other POTW for heat drying pathogen reduction compliance.*
 - Though R5 demands that MMSD “measure and record product temperature at the outlet of each operating dryer at least twice per day,” MMSD knows of no other POTW that has determined the technical means by which this measurement is possible.
 - R5 claims to have undertaken an investigation of techniques to directly measure product temperature but, despite several requests for the Region to share its findings, they decline to discuss the results – or lack of results – of their investigation until *after* MMSD has signed the AO obligating it to perform direct measurement.

POINT TWO: R5’s RELIANCE UPON AND INTERPRETATION OF WISCONSIN LAW FOR ENFORCING FECAL COLIFORM SAMPLING LOCATION ENCROACHES ON THE POWERS PLAINLY DELEGATED TO THE STATE OF WISCONSIN.

- *In the absence of specific direction in Part 503, R5 again generously interprets Wisconsin Administrative Code for authority to demand that MMSD perform additional testing of fecal coliform (at distribution and bagging) to comply with its permit, Wisconsin law and Rule 503.*
 - R5 injects into state law requirements that are not stated in Wisconsin law, and arguably, that the State never intended to include.
 - R5’s interpretation of NR 204.07(6)(a)(1) goes beyond the language of the law and past interpretations by the governing state of Wisconsin, which has consistently granted NPDES permits to the JIWR facility which do not incorporate the now-asserted EPA requirements.
 - And R5 problematically goes further, stating that noncompliance with its expanded reading of NR 204.07(6)(a)(1) demonstrates that MMSD further failed to comply with Part 503, which lacks basis in any Part 503 language or EPA guidance.

POINT THREE: THE PROPOSED AO WOULD DICTATE THAT MMSD REQUEST SPECIFIC PERMIT TERMS CONSISTENT WITH R5’s ATTEMPTED EXPANSION OF FEDERAL AND STATE REQUIREMENTS IN THE CURRENT RENEWAL OF THE DISTRICT’s NPDES PERMIT. MMSD’s PERMIT REISSUANCE APPLICATION TO WDNR, NOW PENDING, ALREADY REQUESTS CLARIFICATION OF THE STATE AND FEDERAL REQUIREMENTS FOR BIOSOLIDS MONITORING AND THE PERMIT PROCESS WILL ENABLE THE STATE TO DETERMINE THE PROPER MONITORING OBLIGATIONS IN AN EXERCISE ITS PRIMACY AS THE DELEGATED PERMITTING AUTHORITY.

- *R5’s draft AO exhibits clear, but unnecessary, federal overreach in its attempt to use an administrative enforcement mechanism to force MMSD to include specific content in its NPDES permit application and in the eventual permit issued by WDNR. MMSD has already requested, in its permit re-issuance application, clarification of permit terms regarding temperature and fecal coliform monitoring.*

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- Permitting for NPDES is a responsibility squarely within the sovereign right of WDNR, as R5 notes earlier in its proposed AO, and has been since 1974. EPA granted the State's request to expand its WPDES program to include administration and enforcement of sewage sludge management in 2000.
- *This is a clear injection of federal preference into laws intended to be enforced and administered by the State of Wisconsin.*

CONCLUSION

- *Milorganite® is a flagship of the industry – its integrity and longevity, including MMSD's ongoing and positive working relationship with the state, should speak volumes.*
- *MMSD is not unwilling to work with R5 and has done so over the prior months, but we want to ensure that they are acting in a manner that is fair and based in applicable law. The best remedy here is the incorporation of clarifying language into the re-issued discharge permit, which is expected in early 2018.*